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In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ROCHELLE ARDALL CROWDER AND
HORACE LEE DAVIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. This case presents an important question to the administration of the federal criminal laws: whether a defendant can preclude admission of relevant evidence of his other wrongs that is otherwise admissible under Fed. R. Evid. 404(b) by offering to concede one or more elements of the crime. Respondents contend that there is no "real" conflict on that issue (Br. in Opp. 6), because no other court of appeals has yet had occasion to consider and reject the approach adopted by the court below, which not only bars the government from introducing evidence but also contemplates that there will be a partial "directed verdict" on one or more elements of the offense. *Id.* at 6-7. Respondents also argue that this Court's review is

not warranted at this time, because "[t]his case turns clearly upon its own unique facts" (*id.* at 8) and "[t]he more difficult and significant cases will be those that follow this decision" (*id.* at 9).

The District of Columbia Circuit, "on its own initiative" (Pet. App. 6a), consolidated respondents' appeals and heard them *en banc* to "address the recurring question of what effect a defendant's unequivocal offer to concede elements of a crime has on the admissibility of prior bad acts evidence under Federal Rule of Evidence 404(b)." Pet. App. 2a. That is not a factbound issue. The court of appeals also recognized that the circuits have "reach[ed] essentially three different positions" (*id.* at 8a) on the question presented. In the face of that widespread conflict, it would not be appropriate to "wait to see if other circuits adopt or reject the D.C. Circuit's ruling." Br. in Opp. 9.

Nor is there reason to delay consideration of the issue until the decision below has generated "difficult and significant" questions in future cases. Br. in Opp. 9. That the decision below will generate troublesome issues in the future reinforces, rather than detracts from, the need for this Court's review. Because the rule adopted by the D.C. Circuit has no statutory or precedential basis, respondents can offer no justification for awaiting "[t]he more difficult and significant cases * * * that [will] follow this decision." *Ibid.*

2. Respondents claim that we have not explained "how the D.C. Circuit's construction of Rule 404(b) is erroneous or how it prejudices the government's legitimate interests" (Br. in Opp. 4), and they assert that the decision below is correct because "a defendant can give up the right to a trial on a particular

element" of the crime. *Id.* at 10. Those criticisms are unfounded.

To begin with, the decision below cannot fairly be viewed as a *construction* of Rule 404(b). Nothing in that rule even remotely authorizes the exclusion of evidence offered for a proper purpose—such as proof of intent, motive, or knowledge. Nor does that rule describe the "partial directed verdict" regime crafted by the court of appeals. Rather, as this Court has explained, see *Huddleston* v. *United States*, 485 U.S. 681, 687-688 (1988), Rule 404(b) merely prohibits one particular *use* of evidence of other wrongs; it does "not flatly prohibit the introduction of such evidence." Thus, "[i]f offered for * * * a proper purpose, the evidence is subject *only* to [the] general strictures limiting admissibility such as Rules 402 and 403." 485 U.S. at 688 (emphasis added). The Rules of Evidence provide a specific remedy for a party who fears that admissible evidence of other wrongs may be misused: an instruction informing the jury that the evidence is to be considered only for the proper purpose for which it was admitted. See Fed. R. Evid. 105; *Huddleston*, 485 U.S. at 691-692. Those rules do not contemplate, much less authorize, the entry of a "directed verdict" in lieu of the admission of evidence.

Respondents assert that a criminal defendant "can give up the right to a trial on a particular element." Br. in Opp. 10. The Federal Rules of Criminal Procedure, however, contemplate that a defendant may waive his right to trial on "a charged *offense*," see Fed. R. Crim. P. 11(e)(1) (emphasis added), and then only by pleading guilty to that offense or a lesser included crime in accordance with detailed, prescribed procedures. Those rules do not authorize a procedure

that wholly removes a single element of an offense from the jury's purview, thus forcing the government to do without evidence on part of its case. Cf. *Singer* v. *United States*, 380 U.S. 24, 35 (1965) (noting that while defendant can waive certain of his trial rights, "it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation").*

3. Finally, there is no basis for respondents' argument that review is unwarranted because the decision below is "limited" to cases in which a defendant offers "an unequivocal and complete * * * concession" on one element and agrees to "a jury instruction that the jury 'must convict' if it finds" the remaining element or elements. Br. in Opp. 8. As we have explained (Pet. 12-13), respondents did not concede *their* intent, since a "concession" that the "real seller" (Pet. App. 13a) had the requisite intent is tautological at best. More fundamentally, the decision below expressly permits criminal defendants to withdraw from the jury all but the most hotly contested facts surrounding the crime, and to require the government to "try" them on "offenses" tailor-made to suit their tactical convenience—which may bear little relationship to the

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* Indeed, the Rules of Criminal Procedure refute respondents' apparent assumption (Br. in Opp. 9) that, because criminal defendants may plead guilty to the charged offense, they have the right to enter a plea or go to trial on whatever conditions they might wish. See, *e.g.*, Fed. R. Crim. P. 11(a)(2) (a defendant may enter conditional plea only "[w]ith the approval of the court and the consent of the government"); Fed. R. Crim. P. 11(b) ("A defendant may plead nolo contendere only with the consent of the court."); Fed. R. Crim. P. 23(a) (a defendant may waive a jury only "with the approval of the court and the consent of the government").

crimes actually defined by Congress. Such a radical departure from traditional criminal trial practice calls for this Court's review.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Acting Solicitor General

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